82-1877

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

MARIO VALDERRAMA LITONJUA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether the United States may be collaterally estopped from litigating a question of constitutional law of public importance by the judgment of a district court in a prior case, involving different parties, in which the question was resolved adversely to the United States.

PARTIES TO THE PROCEEDINGS

In addition to Mario Valderrama Litonjua, respondents are petitioners for naturalization Antolin Punsalan Pangilinan, Panfilo Jabalde, Fidel Zosimo Usi Canilao, Antonio Patdo Tantay, Arcadio Revilla Nepomuceno, Dionisio Vallejos Lucas, Oliver Juan Posadas, Vincente Miranda Belizario, Rodolfo DeJesus Batac, Pedro Dumlao Ponciano, Cesar Jocson Ascalon, Winifredo Pableo Bello, Bonifacio Leoncio Zarcal and Benjamin Natividad Bonus.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-14a) is reported at 694 F.2d 603. The opinion of the district court denying the naturalization petition of respondent Litonjua (App. B, *infra*, 15a-21a) is unreported, as is the order of the district court (App. C, *infra*, 22a-23a) denying the naturalization petitions of the remaining respondents.

JURISDICTION

The judgments of the court of appeals (Apps. D. and E, *infra*, 24a, 25a-26a) were entered on December 10, 1982, and a timely petition for rehearing was

denied on February 22, 1982 (App. F, *infra*, 27a-28a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 701, 702 and 705 of the Nationality Act of 1940, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005; Section 310(e) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1421(e); and 28 C.F.R. 0.20(b) are reproduced in Appendix G, *infra*, 29a-31a.

STATEMENT

1. Respondents are 15 Filipinos who served in the United States' armed forces during World War II. Each entered the United States in a nonimmigrant status and at some date subsequent to November 30, 1977, filed a petition for naturalization based upon his wartime service. These petitions rest upon Sections 701-705 of the Nationality Act of 1940, 8 U.S.C. (Supp. V 1945) 1001-1005, as added by the Second War Powers Act, 1942, ch. 199, Section 1001, 56 Stat. 182-183.

Section 701 of the 1940 Act exempted from some of the usual requirements for naturalization, including literacy in English and a period of residence in the United States, alien service members who served honorably in the United States armed forces during World War II in locations beyond the continental limits of the United States. Section 702 of the 1940 Act provided for the overseas naturalization of persons serving in the United States armed forces who were eligible for naturalization under Section 701 but who were beyond the territorial jurisdiction of United States courts vested with naturalization authority. Under Section 702, representatives designated by the

Commissioner of Immigration and Naturalization were authorized to receive naturalization petitions, conduct necessary hearings and grant naturalization to such persons in overseas locations.

As amended by Section 202(c)(1) of the Act of Dec. 28, 1945, ch. 590, 59 Stat. 658, Section 701 specified that any petition submitted thereunder had to be filed by December 31, 1946. Thus, the statutory authority under which respondents sought naturalization had expired more than 30 years prior to the filing of their naturalization petitions. Each respondent nonetheless argued that he was entitled to naturalization under Section 701, asserting that he was denied due process of law by the Attorney General's removal of Section 702 overseas naturalization authority from the American vice-consul stationed in Manila for a portion of 1945 and 1946.[1] Respondents contended, moreover, that the United States is collaterally estopped from opposing their naturalization petitions by the unappealed judgment in *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) ("*68 Filipinos*"), which resolved the due process issue against the United States in connection with the naturalization petitions of other Filipino veterans.[2]

None of the respondents claimed to have made any effort to secure naturalization under Section 702 in the Philippines. Thus, none of the respondents quali-

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[1] Those events are described in greater detail in our brief in *United States* v. *Mendoza*, No. 82-849 (1982 Term), at pages 4-6. As described below, this case presents precisely the same question as *Mendoza*. Copies of our brief in *Mendoza* have been served upon counsel for respondents.

[2] The *68 Filipinos* litigation and its aftermath are described at pages 9-12 of the Brief for the United States in *Mendoza*.

fied as "Category I" veterans—that class of individuals whose naturalization applications the Attorney General decided not to oppose in the aftermath of the *68 Filipinos* litigation.[3] Furthermore, respondents filed their naturalization applications after the United States had withdrawn its appeal in *68 Filipinos*. Accordingly, they were unable to avail themselves of the "grandfather rule" applied by the Solicitor General in cases arising from petitions filed before that date, pursuant to which the United States acquiesced in the grant of naturalization to such Filipino veterans if they satisfied the substantive requirements for naturalization under Section 701.[4]

2.a. All of the respondents except Litonjua filed their petitions in the United States District Court for the Northern District of California. These 14 respondents (Pangilinan, *et al.*; see page I, *supra*) stipulated with the government that their legal claims are identical to those of the "Category II" veterans granted naturalization in *68 Filipinos*. E.R. 1.[5] The naturalization examiner rejected the rulings of the district court in *68 Filipinos*, however, and concluded that: (1) respondents' naturalization is barred by 8 U.S.C. 1421(e), which precludes naturalization under expired or superseded statutory provisions; (2) respondents' claims are barred by laches; (3) respondents'

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[3] See Brief for the United States at 12, *United States* v. *Mendoza*, No. 82-849, *supra*.

[4] See Brief for the United States at 12 n.13, *United States* v. *Mendoza*, No. 82-849, *supra*.

[5] "E.R." denotes the excerpt of record filed in the court of appeals in conjunction with the appeal of respondents Pangilinan, *et al.*

due process claims are nonjusticiable because their adjudication would trench impermissibly upon the conduct of the foreign relations of the United States by the Executive Branch; (4) those claims are, in any event, nonmeritorious; (5) respondents suffered no prejudice from the government conduct complained of; and (6) respondents' claims are barred by *INS* v. *Hibi*, 414 U.S. 5 (1973). E.R. 2-31. On September 24, 1980, upon consideration of the Immigration and Naturalization Service recommendation and the Second Circuit's decision in *Olegario* v. *United States*, 629 F.2d 204 (1980), cert. denied, 450 U.S. 980 (1981),[6] the district court denied the petitions of the 14 respondents in a single order (App. C, *infra*, 22a-23a). These cases were consolidated for purposes of appeal.

b. Respondent Litonjua's petition was filed in the United States District Court for the Southern District of California. The naturalization examiner recommended that Litonjua's petition be denied, for essentially the same reasons advanced by the INS in opposition to naturalization of respondents Pangilinan, *et al.* C.R. 1.[7] The district court denied Litonjua's naturalization petition on April 9, 1981 (App. B, *infra*, 15a-21a.). Although the district court concluded that Litonjua's claim is not barred by the political question doctrine, laches, 8 U.S.C. 1421(e), a failure to demonstrate prejudice, or the decision in *INS* v. *Hibi*, *supra*,

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[6] The Second Circuit's decision in *Olegario*, which rejects the due process claim sustained in *68 Filipinos*, is described in our brief in *Mendoza* at pages 13-14.

[7] "C.R." denotes the clerk's record filed in the court of appeals in conjunction with respondent Litonjua's appeal. The numerical entry is the sequential number of the document cited in the compiled clerk's record.

the court, following the Second Circuit's analysis in *Olegario*, rejected the due process claim on the merits (App. B, *infra*, 19a-20a). The court also rejected Litonjua's contention that the unappealed judgment of the district court in *68 Filipinos* collaterally estops the United States from contesting the due process claim (App. B, *infra*, 20a-21a). Respondent Litonjua's appeal was considered with the appeals of respondents Pangilinan, *et al.*

3. While respondents' appeals were pending, the court of appeals rendered its decision in *Mendoza* v. *United States*, 672 F.2d 1320 (1982), cert. granted, No. 82-849 (Jan. 24, 1983), holding that the district court's judgment in *68 Filipinos* collaterally estops the United States from opposing naturalization of a Filipino veteran qualifying under Section 701. Shortly thereafter, the court of appeals reversed the district courts' judgments in respondents' cases and directed that each naturalization petition be granted on the ground that the district court's judgment in *68 Filipinos* precluded relitigation of the due process issue considered there. The court of appeals invoked stare decisis, stating (App. A, *infra*, 10a): "*Mendoza* must control the disposition of the *Pangilinan* and *Litonjua* appeals." The court of appeals concluded that the petitioners in *Pangilinan* and *Litonjua* were situated identically to Mendoza (*id.* at 4a-5a) and rejected the government's arguments against application of collateral estoppel for the reasons stated in its opinion in *Mendoza* (*id.* at 7a-10a).[8]

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[8] In addition to the appeals of Litonjua and Pangilinan, *et al.*, the court of appeals' opinion in this case addressed the separate appeal of Renato Leopoldo Barretto from the order denying his naturalization petition. Unlike respondents, Barretto filed his naturalization petition prior to the government's

4. By the time the court of appeals rendered its decision in this case, the government had filed its petition for a writ of certiorari in *Mendoza*. In an effort to make unnecessary the filing of a certiorari

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withdrawal of its appeal in *68 Filipinos*. Notwithstanding the grandfather rule applied in such cases by the Solicitor General, see page 4, note 4, *supra*, the INS opposed Barretto's naturalization petition because he had spent the period February 1945 through June 10, 1946, in the United States, undergoing military flight training, during which time he could have been naturalized by a United States District Court pursuant to Section 701 of the 1940 Nationality Act. Moreover, Barretto had actually filed a preliminary application for naturalization under that Act, which he failed to perfect, while in the United States. Twenty days after his return to the Philippines from his tour of duty in the United States, Barretto was discharged from the United States armed forces and thus became ineligible for naturalization under Section 702 of the 1940 Nationality Act. He accordingly was stationed in the Philippines for only 20 days out of the period in 1945 and 1946 when naturalization under Section 702 was unavailable there because of the withdrawal of naturalization authority from the United States consular official in Manila.

The district court denied Barretto's naturalization petition. Pet. No. 248806-WWS (N.D. Cal. Aug. 15, 1980). The court concluded that Barretto could not claim any injury from the course of the government's administration of Section 702 in the Philippines, because he had been in the United States for almost all of the time during which a naturalization officer was absent from the Philippines, and had not sought naturalization during the 20 days after his return from the United States while he was still eligible for naturalization under Section 702.

The court of appeals reversed, directing that Barretto's petition be granted. The court did not rely directly upon the collateral estoppel rationale of *Mendoza*. Instead, the court's decision rested on the grandfather policy adopted by the Solicitor General respecting naturalization petitions filed by Filipino

petition here, the government filed a petition for rehearing in which it informed the court of appeals of the pendency of the petition in *Mendoza* and suggested that the panel hold this case for reconsideration as appropriate in light of the ultimate disposition of *Mendoza*. The court of appeals subsequently was advised that this Court had granted the government's petition for certiorari in *Mendoza*. Nevertheless, the court of appeals denied the petition for re-

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veterans of World War II prior to November 30, 1977, and a stipulation, purportedly made by government counsel at oral argument, to the effect that the government would withdraw its opposition to Barretto's petition "if this court [*i.e.*, the court of appeals] finds that Barretto is" situated similarly to Filipino veterans who spent the period when naturalization was unavailable in the Philippines in that location (App. A, *infra*, 12a). The court of appeals held that Barretto's situation was indistinguishable from that of other Filipino veterans who had filed their petitions in time to avail themselves of the "grandfather rule." The court explained (*id.* at 13a):

> In *Mendoza* we found that Dr. Mendoza's presence in the Philippines for as much as three months, after having been in the United States for several months, was sufficient to implicate Dr. Mendoza's due process rights, 672 F.2d at 1326 n.8; we know of no principled basis—and the government offers none—for drawing a line between three months in Dr. Mendoza's case and three weeks in this case. If the government's conduct violated the constitutional rights of Filipinos serving in the United States armed forces in the Philippines, it violated their rights whether they were in the Philippines for nine months or nine days.

The court of appeals concluded (App. A, *infra*, 14a): "[P]ursuant to the government's 'grandfather' policy and its stipulation in court, we hold that Barretto is legally entitled to be naturalized."

hearing on February 22, 1983, its order reciting that "the Suggestion to Hold in Abeyance is rejected" (App. F, *infra*, 28a).[9]

REASONS FOR GRANTING THE PETITION

On January 24, 1983, this Court granted the petition for a writ of certiorari in *United States* v. *Mendoza*, No. 82-849. The Court thus undertook to review the court of appeals' ruling that the unappealed judgment in *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975), collaterally estops the government from contesting the naturalization petitions of other Filipino war veterans resting on Section 701 of the Nationality Act.

As explained above (page 6), the decision of the court of appeals directing that respondents' petitions for naturalization be granted rests squarely upon its earlier decision in *Mendoza*. Accordingly, this Court's decision in *Mendoza* should control the disposition of this case. In the circumstances, it is appropriate to hold this case for disposition in light of *Mendoza*.[10]

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[9] On May 16, 1983, the district court granted respondent Litonjua's petition for naturalization pursuant to the mandate of the court of appeals. After the district court had advised the parties of its intentions, the government moved the court of appeals to recall the mandate, but the court of appeals took no action on that motion by the time the district court had fixed for a naturalization hearing. The district court accordingly proceeded to naturalize Litonjua. These events do not moot this case as to Litonjua, because reversal of the judgment of the court of appeals would enable the government to have the naturalization decree vacated pursuant to 8 U.S.C. 1451(j) and Fed. R. Civ. P. 60(b)(5). See *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972).

[10] As indicated above (page 7 note 8), the court of appeals' judgment with respect to the naturalization petition of

CONCLUSION

The petition for a writ of certiorari should be held for appropriate disposition in light of *United States* v. *Mendoza*, No. 82-849.

Respectfully submitted.

REX E. LEE
Solicitor General

MAY 1983

Renato Leopoldo Barretto appears to rest upon a ground that is at least formally independent of the court's *Mendoza* doctrine. Although we are troubled by this branch of the court of appeals' decision, the issues presented are distinct from those in *Mendoza* and, because fact-bound, do not appear to warrant further consideration. Accordingly, we do not seek review of the court of appeals' judgment directing that Barretto's petition for naturalization be granted.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4441

D.C. No. 248806 WWS

RE NATURALIZATION OF
RENATO LEOPOLDO BARRETTO, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

No. 80-4543

D.C. No. 251849-WWS

RE NATURALIZATION OF
ANTOLIN PUNSALAN PANGILINAN, ET AL.,
PETITIONER-APPELLANTS

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

No. 81-5427

D.C. No. 23358-GT

RE NATURALIZATION OF
MARIO VALDERRAMA LITONJUA,
PETITIONER-APPELLANT

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

OPINION

Appeals from the United States District Courts
for the Northern and Southern District of California

Honorable William W. Schwarzer,
U.S. District Judge, Presiding

Honorable Gordon Thompson, Jr.,
U.S. District Judge, Presiding

Argued and Submitted August 13, 1982

Before: SCHROEDER, FLETCHER, and NORRIS, Circuit Judges.

NORRIS, Circuit Judge:

These are three more in a series of Filipino war veteran cases arising under §§ 701-705 of the Nationality Act of 1940, Pub. L. No. 76-853, Ch. 199, 54 Stat. 1137, *as amended by* Pub. L. No. 77-507 § 1001, 56 Stat. 182 ("1940 Act"). Appellants are all Filipino veterans who served honorably in the United States armed services during World War II. They claim that they are entitled to United States citizenship under the 1940 Act because they were denied due process of law when the United States Attorney General removed an authorized naturalization officer from the Philippines in October 1945. They also contend that the government is collaterally estopped by the judgment in *Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) ("*68 Filipinos*") from relitigating their due process claims. The district courts denied all petitions. We reverse and grant the petitions.

I

A.

The history of this litigation is discussed at length in *Mendoza* v. *United States*, 672 F.2d 1320 (9th Cir. 1982) and *68 Filipinos*. We repeat it briefly here.

In March 1942, Congress amended the Nationality Act of 1940, Pub.L. No. 76-853, 54 Stat. 1137, to provide for naturalization of non-citizens who served honorably in the United States armed forces. 56 Stat. 182 (repealed 66 Stat. 280, June 27, 1952). As amended, the 1940 Act exempted alien servicemen from certain of the usual naturalization requirements, *id.* at § 701, and provided for overseas naturalization of servicemen on active duty. *Id.* at § 702. As further amended, the Act required that all petitions for naturalization under §§ 701 and 702 be filed by December 31, 1946. Act of Dec. 28, 1945, Pub.L. No. 79-270, § 202(c)(1), 59 Stat. 658 (repealed 66 Stat. 280, June 27, 1952).

In early August 1945, the Immigration and Naturalization Service (INS) designated George Ennis, Vice Consul in Manila, to naturalize Filipino servicemen under the 1940 Act. But when the Philippine government expressed concern that naturalizations under the Act would drain the country of much-needed manpower, the Attorney General revoked Vice Consul Ennis' naturalization authority. As a result, between October 1945 and August 1946, no INS official was present in the Philippines to naturalize eligible servicemen.

B.

In 1975, the claims of 68 Filipino war veterans, whose petitions for naturalization pursuant to the 1940 Act had been denied by the IRS, were joined

in district court. *Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) (Renfrew, J.). Judge Renfrew divided the petitioners into two relevant categories: those who had taken some action to be naturalized in the Philippines prior to December 31, 1946, but had not been processed by the INS (Category I), and those who had taken no action to be naturalized in the Philippines (Category II)[1]. Judge Renfrew granted the petitions of "Category I" veterans on the alternate grounds that the government had engaged in "affirmative misconduct," which estopped it from contesting the veterans' petitions, and that the petitions had been "constructively filed" within the statutory deadline. *Id.* at 937-40. Judge Renfrew granted the petitions of "Category II" veterans on the ground that withdrawal of the naturalization examiner from the Philippines violated the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 951. The government filed a notice of appeal, but then withdrew it, permitting the judgment to become final.

II

A.

Appellant Pangilinan is one of fourteen Filipino veterans whose petitions were consolidated on appeal. We treat all fourteen as "Category II" veterans on the basis of a stipulation that their petitions raise issues identical to those raised by the "Category II" veterans in *68 Filipinos*. All served honorably in the United States armed forces; all were in the Phil-

[1] A third category included Filipinos who could not prove that they had been eligible for naturalization under §§ 701-705.

ippines on active service for some or all of the time that naturalization authority was withdrawn; and none took steps to become naturalized while in the Philippines.

We also conclude that appellant Litonjua should be treated as a "Category II" veteran.[2] He enlisted in the United States Navy in 1941 and became a prisoner of war in 1942. After his release in early 1945, Litonjua rejoined his unit in the Philippines, where he remained in active service until he was honorably discharged on April 10, 1946.[3] Thus, he was in the Philippines and eligible to be naturalized during a six month period (October 1945 to April 1946) when there was no INS official available to process his petition.

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[2] Although it did not raise the argument in its brief, the government asserted at oral argument that Litonjua is not a "Category II" veteran because he sought naturalization in Seattle after his discharge from the military. The argument is meritless. Litonjua was in the Philippines for six of the nine months that naturalization authority was withdrawn and, like the "Category II" veterans in *68 Filipinos*, he made no effort during that period to be naturalized under § 702. *See Mendoza*, 672 F.2d at 1326 n.8.

[3] Shortly thereafter, Litonjua went to Seattle, Washington as a civilian employee of the United States Army Transport Service. While in Seattle, he took steps to become naturalized under the 1940 Act, but, for reasons that are not clear on the record, the petition process was not completed. Litonjua is not, however, a "Category I" veteran, because the "Category I" veterans in *68 Filipinos* sought naturalization under § 702 while still on active duty in the Philippines. Litonjua claims that he should nonetheless be deemed to have constructively filed his petition before the statutory deadline. Because we resolve his case on an alternate ground, we do not reach this issue.

Because the theory of Barretto's claim differs from that of Pangilinan and Litonjua, we treat the status of his naturalization petition in Part III.

B.

Although Litonjua and the Pangilinan petitioners are "Category II" veterans, the district judges below declined to estop the government from relitigating the issues decided in *68 Filipinos*. Instead, they reached the merits of appellants' constitutional claims, and, relying on *Olegario* v. *United States*, 629 F.2d 204 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981), denied the veterans' petitions. In so doing, they acted without the benefit of our decision in *Mendoza* v. *United States*, 672 F.2d 1320 (9th Cir. 1982), in which we affirmed a district court judgment collaterally estopping the government on precisely these facts. Accordingly, the threshold legal question in the Litonjua and Pangilinan appeals is the effect of our decision in *Mendoza* on the question whether the government should be precluded from relitigating issues decided in *68 Filipinos*.[4]

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[4] Because the relevant facts are not in dispute, this court is equipped to decide whether, in light of *Mendoza*, collateral estoppel should be invoked offensively against the government in the *Pangilinan* and *Litonjua* cases. See *Starker* v. *United States*, 602 F.2d 1341 (9th Cir. 1979). In *Starker*, as here, the district court declined to estop the government collaterally, but did so without the benefit of the Supreme Court's decision in *Parklane Hosiery* v. *Shore*, 439 U.S. 322 (1979). Rather than remand to the district court for reconsideration in light of *Parklane Hosiery*, our court made an independent determination to apply collateral estoppel against the government, reasoning that "we [could] discern no useful purpose in a remand for the exercise of the discretion called for in *Parklane Hosiery*. This court can apply to agreed facts the dis-

The facts presented in *Mendoza* were similar to those at issue here. Dr. Mendoza, like Litonjua and the Pangilinan petitioners, qualified as a "Category II" veteran. He served in the United States armed forces from December 1, 1941 until June 30, 1946. During that time, he was captured by the Japanese and survived the Bataan Death March. Once released by the Japanese, he was sent to the United States for army medical training; six months later, he returned to the Philippines, where he remained for the duration of his service. At no point during that time—indeed, not until 1978—did he make any effort to become an American citizen. The district court, in granting Dr. Mendoza's petition for naturalization, applied the doctrine of collateral estoppel based upon the guidelines set out in *Parklane Hosiery* v. *Shore*, 439 U.S. 322 (1979), which encouraged use of collateral estoppel offensively when its application would not be unfair to the defendant.[5] We held that the district court did not abuse its discretion because the "dual purpose of protecting litigants from the burden of relitigating an identical issue . . . and of promoting judicial economy by preventing needless litigation," *id.* at 326, would be served by barring

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cretionary standards set out in that opinion." *Starker*, 602 F.2d at 1349. Similarly, no useful purpose would be served by a remand to determine on the basis of the agreed facts the legal effect of our decision in *Mendoza* on the Litonjua and Pangilinan petitions.

[5] The Court in *Parklane Hosiery* identified several potential sources of unfairness: if potential plaintiffs sit on the sidelines until another plaintiff has obtained a favorable judgment; if the second action involves substantially higher stakes than the first, or affords the defendant procedural opportunities not originally available; or if circumstances have changed by the time of the second suit. 439 U.S. at 330-31.

the government from relitigating issues decided in *68 Filipinos*. *Mendoza*, 672 F.2d at 1325-26. We were unpersuaded by the government's argument that it would be unfair [6] to grant Dr. Mendoza's naturalization petition without reaching the merits of his equal protection claim.

To support its claim of unfairness, the government in *Mendoza* first asserted that it had prematurely withdrawn its appeal in *68 Filipinos* because it had grossly underestimated the number of Filipinos who would become eligible for naturalization under its holding. We found no record support, however, for the contention that, after withdrawing its appeal, the government discovered that as many as 60,000-80,000 Filipino veterans could be expected to petition for naturalization in reliance upon Judge Renfrew's decision in *68 Filipinos*. The government, for instance, did not indicate how many of those potential applicants had in fact petitioned after *68 Filipinos* was decided in 1975, or how many of those veterans actually eligible to petition were realistically likely to do so nearly 40 years after the end of World War II. In fact, the record suggests that only a very few Filipinos had taken advantage of the opportunity; congressional testimony by INS officials indicated that no more than 100 Filipinos had applied for naturalization as of 1978. 672 F.2d at 1327. In the cases now before us, the government has made no effort to challenge that testimony or otherwise bolster its claim of unfairness; in fact, at oral argument the

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[6] The government did not contend that Dr. Mendoza had adopted a "wait and see" attitude to reap the fruits of the earlier litigation; we thus did not reach the issue whether application of collateral estoppel would have been inappropriate on that score.

government formally abandoned its contention that the issues in *68 Filipinos* should be relitigated because it had grossly miscalculated the impact of that decision on the number of naturalization petitions from Filipino war veterans it could expect to receive.

In *Mendoza*, we also rejected the government's argument that collateral estoppel should be invoked offensively only against private litigants. *Id.* at 1329. Acknowledging that relitigation by the government might be warranted in cases raising significant issues of public policy or constitutional law, we nonetheless found no compelling need for relitigation in that case.

The merits of these arguments were thus fully considered in *Mendoza*, and need not be reconsidered here. We now address the government's sole remaining argument[7] that giving collateral estoppel effect to *68 Filipinos* would insulate significant constitutional issues from appellate review. *See Montana* v. *United States*, 440 U.S. 147, 163 (1979) (cautioning that collateral estoppel should not be applied lightly where to do so might freeze constitutional doctrine on significant national issues); *Mendoza*, 672 F.2d at 1329-30. Although we readily agree that the constitutional issues raised in *68 Filipinos* are significant, we believe that the government overstates the precedential value of *68 Filipinos*, which is, after all, a district court opinion rendered on extraordinary facts. The events giving rise to the *68 Filipinos* claims occurred over 35 years ago in the unusual context of a war-related immigration statute and the impending independence of the Philippines; it is

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[7] As in *Mendoza*, the government does not suggest that Litonjua and the Pangilinan petitioners could have joined the *68 Filipinos* litigation and thus that they are unfairly profiting from its results.

highly improbable that the government will again be involved in litigation involving analogous facts. And if legal issues analogous to those resolved in *68 Filipinos* arise on different facts, the government would be free to relitigate them, *see Commissioner* v. *Sunnen*, 333 U.S. 591, 601-02 (1948); *Montana* v. *United States*, 440 U.S. at 162-63, burdened only by a district court opinion as related precendent.[8] Thus, application of collateral estoppel would not freeze constitutional doctrine on important national issues or otherwise inhibit healthy development of the law.

Absent a change in circumstances, which the government has neither claimed nor demonstrated, therefore, *Mendoza* must control the disposition of the *Pangilinan* and *Litonjua* appeals. We conclude that our determination in *Mendoza* that it is not unfair to estop the government from contesting the naturalization petitions of "Category II" veterans is binding in these cases as *stare decisis*. To permit district courts in the Ninth Circuit to redetermine the issue of fairness after our decision in *Mendoza*—and thus treat identically situated "Category II" veterans differently from Dr. Mendoza—would be abhorrent to the principles of consistency and fairness that underlie the doctrine of *stare decisis*, *see Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 272 (1980), and would undermine "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

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[8] Moreover, since the Second Circuit has declined to collaterally estop the government, and has disagreed with *68 Filipinos* on the merits, *Olegario* v. *United States*, 629 F.2d 204, 214-15, 130 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981), there is a conflict in the circuits, and courts addressing analogous legal issues on new facts will have the benefit of both opinions.

For the foregoing reasons, therefore, we hold that the government is collaterally estopped from relitigating against these "Category II" veterans the issues decided in *68 Filipinos*.[9] This result is consistent with the guidelines set out in *Parklane Hosiery*. Once it has been conclusively determined that collateral estoppel is not unfair to a defendant, and does not reward a plaintiff who could easily have joined the initial suit, we believe that, absent a change of circumstances, *Parklane Hosiery* requires its application as a matter of law. By deciding as we do, we thus adhere both to the standards set in that case and to the reasoning of our *Mendoza* decision.

III

We now turn to Appellant Barretto's petition. Barretto joined the United States armed forces in August 1941. He saw active duty in Central Luzon, Bataan and Corregidor and was imprisoned by the Japanese from May 1942 to November 1943. In February 1945, Barretto was assigned to flight training duty in the United States. While there, he tried to file a preliminary application for naturalization under the 1940 Act, but the INS would not accept his application because it lacked the signature of his commanding officer.[10] Barretto returned to the Philip-

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[9] We do not hold that the trial judges, who ruled without the benefit of *Mendoza*, abused their discretion in denying collateral estoppel. Rather, we hold that, in light of *Mendoza*, the government is now estopped as a matter of law.

[10] Barretto was unable to obtain the signature because his commanding officer was in the Philippines. Barretto argues that the signature was required only on the filing of a formal petition and that the refusal to accept his preliminary applica-

pines on June 10, 1946 and was discharged from the United States armed forces on June 30, 1946.

Barretto filed this petition for naturalization in June 1977, and the government withdrew its *68 Filipinos* appeal in November 1977. Because several Filipino veterans apparently agreed with the INS to hold their claims in abeyance pending the outcome of the appeal in *68 Filipinos*, the government has adopted a "grandfather" policy of granting any petitions filed by "Category II" veterans before withdrawal of the *68 Filipinos* appeal.[11] Brief of Respondent-Appellee at 13 n.21; Supplemental Brief of Respondent-Appellee at 2-6. *See, e.g., United States* v. *Domingo* v. *Avena*, No. —— (N.D. Cal. Jan. 17, 1979), *appeal withdrawn*, No. 79-4361 (9th Cir. —— 1979). At oral argument, the government stipulated that it would withdraw its opposition to Barretto's petition if this court finds that Barretto is a "Category II" veteran within the meaning of *68 Filipinos*.

The district court held that Barretto is not a "Category II" veteran because he was not prejudiced by the government's withdrawal of naturalization authority from the Philippines. The district court reasoned that Barretto was in the United States during much of the period that a naturalization officer was absent from the Philippines; that Barretto was stationed in the Philippines and eligible for naturalization under § 702

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tion was "affirmative misconduct," and that the government is thus estopped from contesting his petition. Because we decide his case on an alternate ground, we do not reach this issue.

[11] The government has also adopted a policy of granting all petitions of "Category I" veterans, whether filed before or after withdrawal of the appeal in *68 Filipinos*. Brief of Respondent-Appellee at 13 n.21.

for only twenty days of that period; and that Barretto testified that he made no attempt to inquire about naturalization after he returned to the Philippines.

We cannot agree that Barretto is disqualified from relief because he was in the Philippines and eligible for naturalization under § 702 for only twenty days. In *Mendoza*, we found that Dr. Mendoza's presence in the Philippines for as much as three months, after having been in the United States for several months, was sufficient to implicate Dr. Mendoza's due process rights, 672 F.2d at 1326 n.8; we know of no principled basis—and the government offers none—for drawing a line between three months in Dr. Mendoza's case and three weeks in this case. If the government's conduct violated the constitutional rights of Filipinos serving in the United States armed forces in the Philippines, it violated their rights whether they were in the Philippines for nine months or nine days.

Nor do we agree that Barretto's failure to inquire about naturalization upon his return to the Philippines disqualifies him from relief as a "Category II" veteran. None of the "Category II" veterans in *68 Filipinos* had taken steps to be naturalized, and we see no reason to distinguish Barretto's inaction from theirs simply because Barretto knew of his right to naturalization under the 1940 Act.[12] Barretto has shown that he would have been eligible for naturaliza-

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[12] The opinion in *68 Filipinos* does not indicate whether the "Category II" veterans did or did not know of their rights under §§ 701-705. In any event, the record does not show that Barretto knew there was a possibility of being naturalized while outside the United States. Thus, even if relevant, we could draw no negative inference from his failure to seek naturalization in the Philippines.

tion in the Philippines if an INS officer had been present, and that he wished to avail himself of his right to naturalization. He has thus demonstrated "a 'distinct and palpable injury' . . . [and] a 'fairly traceable' causal connection between the claimed injury and the challenged conduct," *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978) (citations omitted), and he has standing as a "Category II" veteran to challenge the government's actions. Thus, pursuant to the government's "grandfather" policy and its stipulation in court, we hold that Barretto is legally entitled to be naturalized.

The judgments of the district courts are REVERSED and the naturalization petitions of all appellants in these consolidated appeals are GRANTED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 23358

IN THE MATTER OF THE PETITION OF
MARIO VALDERRAMA LITONJUA

MEMORANDUM DECISION
AND ORDER

Petitioner is a native and citizen of the Philippines. In 1941, he enlisted in the United States Navy. He became a prisoner of war on May 6, 1942. He rejoined his unit on March 21, 1945. He received an honorable discharge on April 10, 1946.

Petitioner testified that while he was in the Navy, he made no effort to apply for United States citizenship because he thought that the only way he could be naturalized was to be physically present in the United States.

In June of 1946, petitioner accepted employment as a civilian with the United States Army Transport Service. He was physically present in the Philippines until early July, 1946, when he departed for the United States on his employer's vessel. Shortly after his arrival in Seattle, Washington, petitioner inquired with the Seattle Immigration Service office regarding the requirements for naturalization.

Petitioner testified that the Immigration Service instructed him not to leave the United States without first contacting the Service and that further process-

ing of his case required verification of his military service.

About 5:00 p.m. on August 16, 1946, petitioner was notified by his employer that he was to depart the Philippines on the next day, a Saturday. Petitioner testified that he attempted to call the Immigration Service but received no answer. He testified that he did not write a letter subsequent to his departure because he was waiting for the Immigration Service to inform him on the status of his application.

Petitioner is seeking naturalization under Sections 701-705 of the Nationality Act of 1940, as amended. 56 Stat. 182-183. Petitioner is ineligible for naturalization under the current statute, 8 U.S.C. § 1440, which requires that eligible servicemen either have enlisted in particular geographical areas not including the Philippines or have been admitted to the United States as permanent residents. The sole issue presented to this court is whether petitioner can be naturalized under the 1940 Act which expired on December 31, 1946.

The Government consents to the application of the 1940 Act and naturalization of some Filipino World War II veterans (Category I veterans) and opposes the application of the 1940 Act and naturalization of others (Category II veterans). The landmark case is *Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) (hereinafter cited as *68 Veterans*).

The court finds that petitioner is not a Category I veteran. The overseas naturalization under Section 702 applied only during active service in the armed forces. According to his own testimony, petitioner took no action while in the armed forces. The Category I veterans in *68 Veterans* all took action while in the service.

Petitioner is a Category II veteran. He did not apply for naturalization while on active duty in the armed forces.

Petitioner has standing to bring this action. This case does not turn on whether petitioner can prove that he would have been naturalized but for the Attorney General's decision to withdraw the naturalization examiner from the Philippines. Petitioner has demonstrated "an injury to himself that is likely to be redressed by a favorable decision," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976), and has shown a "fairly traceable causal connection between the claimed injury and challenged conduct." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978).

The precise issue in this case involves the due process constraints on the executive authority. Although the naturalization statute at issue here was enacted and implemented during World War II, it was not a military measure and did not directly concern the war effort. While the court is not equipped to judge the merits of naturalization laws or the wisdom with which they are implemented, it can determine whether the government's actions were arbitrary, unauthorized and unconstitutional. Thus, the court finds that petitioner's claim is not foreclosed by the political question doctrine under any of the standards described in *Baker* v. *Carr*, 369 U.S. 186 (1961).

The court finds that petitioner is not barred by laches from instituting this action. Laches demands more than delay; it requires lack of diligence. *City of Davis* v. *Coleman*, 521 F.2d 661 (9th Cir. 1975). The Government has failed to establish that petitioner has slept upon his rights and has failed to es-

tablish that the Government will be unfairly prejudiced by petitioner's delay in instituting this action. Moreover, petitioner's due process claim, which is distinct from a claim of estoppel against the government, is not barred by the Supreme Court's decision in *INS* v. *Hibi*, 414 U.S. 5 (1973) (Filipino war veteran could not claim estoppel against the government for its failing to advise him of right to naturalization under the 1940 Act).

The court finds that Section 310(e) of the Immigration and Nationality Act of 1952, 75 Stat. 656, 8 U.S.C. § 1421(e), cannot be applied to negate the due process rights of petitioner. The Ninth Circuit's ruling in *United States* v. *Pasion*, 524 F.2d 249 (9th Cir. 1975), is inapplicable to the case at bar since the court in *Pasion* did not consider whether Section 310(e) should be applied to deny a constitutional remedy.

The court has found that petitioner's claim is neither a nonjusticiable political question nor barred by *Hibi*, statutory, or equitable limitations. Thus, the court is faced squarely with reviewing the merits of petitioner's constitutional arguments.

Petitioner was a United States national protected by the United States Constitution until the Philippines became an independent country on July 4, 1946. *See Johnson* v. *Eisentrager*, 339 U.S. 763, 771, 780 (1950). Petitioner can assert a claim based on the Due Process Clause of the Fifth Amendment and the Equal Protection rights derived from that provision. *See Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). Thus, petitioner was entitled to claim the protections of the Due Process Clause at the time the naturalization examiner was withdrawn from the

Philippines. However, the court, following the recent Second Circuit opinion in *Olegario* v. *United States*, 629 F.2d 204 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3663 (March 9, 1981), finds no due process violation arising from the withdrawal of the naturalization examiner.

The withdrawal of the naturalization examiner from the Philippines did not constitute an unconstitutional exercise of executive authority. While Congress is vested with authority over naturalization, the executive's wide discretion in foreign affairs may affect national policy toward noncitizens. *See Hampton* v. *Mow Sun Wong*, 426 U.S. 88, at 105, 114, 115 (1976). The court finds that the Attorney General's decision to withdraw the naturalization examiner from the Philippines was a response to the concern expressed by the Philippine government that too many Filipino males would be lost to naturalization by the United States. The authority granted to the Immigration and Naturalization Commissioner and the Attorney General to implement the 1940 Act without specific guidelines or restrictions, was sufficient to permit the executive to exercise some discretion when confronted with the request by the Philippine government to withdraw the authority of the naturalization examiner. The court concludes that the decision to withdraw the naturalization examiner from the Philippines was not beyond the limits of the Attorney General's discretion or Congress' mandate for the executive branch to implement the 1940 Act.

Having concluded that the withdrawal of the naturalization examiner from the Philippines was neither unauthorized nor inconsistent with Congress' intent, the question before this court is whether the

national interests at stake justified this decision. "When the federal government seeks to sustain a rule discriminatorily against noncitizens in a manner which would violate equal protection if adopted by a state, it must demonstrate that the rule substantially furthers important federal interests in the regulation of immigration and naturalization." *Mow Sun Wong* v. *Hampton*, 435 F.Supp. 37, 44 (N.D. Cal. 1977). The equal protection analysis involves significantly different considerations when it concerns the relationship between aliens and the states rather than the relationship between aliens and the federal government. *Mathews* v. *Diaz*, 426 U.S. 67, 84-85 (1976). The analysis in *68 Veterans* relied primarily on Fourteenth Amendment cases which applied the compelling state interest test to alienage classifications by the states. However, Supreme Court cases decided after *68 Veterans* demonstrate that this heightened scrutiny is inappropriate for federal policies and regulations, particularly in the areas of immigration and naturalization.

The court concludes that the decision made by the Immigration and Naturalization Commisisoner and the Attorney General to withdraw the naturalization examiner from the Philippines was justified in light of the express federal interest in responding to the concerns voiced by the Philippine government. While this action did have an adverse impact on Filipino servicemen, it was justified by a sufficiently important interest in foreign affairs to satisfy the appropriate constitutional standard.

Finally, the court holds that the Government's failure to appeal the decision in *68 Veterans* does not collaterally estop the Government from relitigating the constitutional issues raised by Category II Veterans.

Petitioner's reliance on *Parklane Hosiery Co.* v. *Shore*, 438 U.S. 322 (1979), which approved the use of "offensive" collateral estoppel under certain circumstances, is misplaced. The decision not to appeal the *68 Veterans* case may have resulted from a variety of factors—scarcity of resources, potential impact, public interest—which were totally unrelated to the legal issues of the case.

The court has no doubt that petitioner would be a fine citizen. However, the court concludes that the Second Circuit in *Olegario* v. *United States, supra*, has correctly analyzed the law. The court concludes that the correct analysis of the law requires the denial of the petition for naturalization.

Accordingly, it is ordered that the petition for naturalization be denied.

IT IS SO ORDERED.

Dated: April 8, 1981

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
Judge
United States District Court

Filed April 9, 1981

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA AT SAN FRANCISCO, CALIFORNIA

IN THE MATTER OF
PETITIONS FOR NATURALIZATION
PURSUANT TO SECTIONS 701 & 702
NATIONALITY ACT OF 1940

DENIAL ORDER

The following petitioners for naturalization have all agreed by stipulation that the issues raised in these petitions, both of fact and law, are identical to the issues of fact and law presented in the Category II petitions in the *Naturalization of 68 Filipino War Veterans,* 406 F. Supp. 931 (N.D. Cal. 1975). All of these petitioners submitted their application after November 30, 1977.

Upon consideration of the Findings of Fact, Conclusions of Law and Recommendations of the Designated Naturalization Examiner of the Immigration and Naturalization Service, and the decision of *Antonio Olegario* v. *United States,* Docket No. 79-6179 (2d Cir. July 16, 1980), IT IS HEREBY ORDERED that each of these 17 petitions, presented in open court the 27th day of August, 1980, listed below, be, and hereby is, denied.

No.	Petition No.	Name of Petitioner
5.	251849	ANTOLIN PUNSALAN PANGILNAN
6.	251866	ANTONIO GUTIERREZ MAGADIA
8.	253028	MARIANO VALERA CARDENAS
10.	257890	PANFILO JABALDE
11.	257893	FIDEL ZOSIMO USI CANILAO
12.	257939	ANTONIO PATDO TANTAY
13.	257943	ARCADIO REVILLA NEPOMUCENO
16.	259187	DIONISIO VALLEJOS LUCAS
17.	259197	EFREN ALMONTE DEL MUNDO
20.	259822	OLIVER JUAN POSADAS
23.	267623	VICENTE MIRANDA BELIZARIO
24.	267645	RODOLFO De JESUS BATAC
25.	267654	PEDRO DUMLAO PONCIANO
26.	268252	CESAR JOCSON ASCALON
28.	268438	WINIFREDO PABLEO BELLO
29.	268448	BONIFACIO LEONCIO ZARCAL
30.	268479	BENJAMIN NATIVIDAD BONUS

IT IS FURTHER ORDERED that these petitions be consolidated so that a single record may be prepared for purposes of any appeal which may be taken.

IT IS FURTHER ORDERED that the petitions listed below be continued, as they did not conform to the agreed stipulation. They will be presented at regularly scheduled hearings, when the issues in the individual petitions are decided.

No.	Petition No.	Name of Petitioner
1.	248961	VICENTE BANARES ABECENDARIO
2.	251819	RUBEN ALUZ COPICO, SR.
3.	251841	LUNA GOZOM JAVIER
4.	251846	TOMAS ALACON BORJA
7.	251887	WENCESLAO GALLEGO LAMSON
9.	257878	JUAN SALVADOR TILETILE
14.	259171	GREGORIO CAHIUINANA YBARDOLAZA
15.	259182	ANDRES VALENZUELA VALENCIA
18.	259230	CASTRO RITO MAGSAYSAY
19.	259254	DEMETRIO JOAQUIN SALDANA
21.	259836	LUCIO RAYMUNDO GALLARDO
22.	261949	SIMEON MALAPIT ABASTILLA
27.	268254	JORGE TUBAYAN POBLETE

By the Court, this 24th day of September, 1980.

/s/ William W. Schwarzer
United States District Judge

Filed: September 24, 1980

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5427

DC CV 23358 GT

RE NATURALIZATION OF
MARIO VALDERRAMA LITONJUA,
PETITIONER/APPELLANT

vs.

IMMIGRATION & NATURALIZATION SERVICE,
RESPONDENT/APPELLEE

Appeal from the United States District Court
for the Southern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and the naturalization petition is granted.

Filed and entered December 10, 1982

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

80-4441)
No. 80-4543)

DC CV 2-460)
2-890) WWS

RE NATURALIZATION OF
RENATO LEOPOLDO BARRETTO,
ANTOLIN PUNSALAN PANGILINAN, ET AL.,
PETITIONERS/APPELLANTS

vs.

UNITED STATES OF AMERICA,
IMMIGRATION & NATURALIZATION SERVICE,
RESPONDENTS/APPELLEES

Appeal from the United States District Court
for the Northern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment

of the said District in this Cause be, and hereby is reversed and the naturalization petitions are granted.

A TRUE COPY
ATTEST Mar. 16, 1983
PHILLIP B. WINBERRY
Clerk of Court

by: /s/ Oscar Tagle
Deputy Clerk

Filed and entered December 10, 1982

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4441

D.C. No. 248806 WWS

RE NATURALIZATION OF
RENATO LEOPOLDO BARRETTO,
PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA,
RESPONDENT-APPELLEE

No. 80-4543

D.C. No. 251849-WWS

RE NATURALIZATION OF
ANTOLIN PUNSALAN PANGILINAN, ET AL.,
PETITIONER-APPELLANTS

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

No. 81-5427

D.C. No. 23358-GT

RE NATURALIZATION OF
MARIO VALERRAMA LITONJUA,
PETITIONER-APPELLANT

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

Before: SCHROEDER, FLETCHER, and NORRIS, Circuit Judges.

ORDER

The Petition for Rehearing is denied and the Suggestion to Hold in Abeyance is rejected.

Filed Feb. 22, 1983

APPENDIX G

STATUTES AND REGULATION INVOLVED

1. 28 C.F.R. 0.20 provides in pertinent part:

> The following-described matters are assigned to, and shall be conducted, handled, or supervised by the Solicitor General, in consultation with each agency or official concerned:
>
> * * * * *
>
> (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing *en banc* and petitions to such courts for the issuance of the extraordinary writs) * * *.

2. Sections 701, 702, and 705 of the Nationality Act of 1940, as amended by the Second War Powers Act, ch. 199, Section 1001, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005, provided in pertinent part: [1]

> Section 701. * * * [A]ny person not a citizen regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and Who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish law-

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[1] The Nationality Act of 1940 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280.

ful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * * *Provided, however*, That * * * (3) the petition shall be filed not later than December 31, 1946. * * *

Section 702. During the present war, any person entitled to naturalization under Section 701 of this Act, who while serving honorably in the military * * * forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Comissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the ad-

missibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship; * * *.

Section 705. The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act.

3. Section 310(e) of the Immigration and Nationality Act of 1952, as added, Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 656, 8 U.S.C. 1421(e), provides:

Notwithstanding the provisions of section 405(a)[2] any petition for naturalization filed on or after September 21, 1961, shall be heard and determined in accordance with the requirements of this subchapter.

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[2] Section 405(a) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280, was a general savings clause that preserved the legal effectiveness of certain acts taken under provisions of prior law that were in other respects superseded by the 1952 Act.

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Office - Supreme Court, U.S.
FILED
JUN 24 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1877

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

MARIO VALDERRAMA LITONJUA,
ET AL., RESPONDENTS

BRIEF OF RESPONDENT MARIO VALDERRAMA LITONJUA IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT A. MAUTINO
Attorney for Respondent
Mario Valderrama Litonjua
443 West C Street, Suite 201
San Diego, CA 92101
(619) 235-9176

QUESTION PRESENTED

Whether the Court should grant the petition in this individual case in view of the equitable considerations involved.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1877

UNITED STATES OF AMERICA, PETITIONER

v.

MARIO VALDERRAMA LITONJUA, ET AL.
RESPONDENTS

BRIEF OF MARIO VALDERRAMA LITONJUA IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REASONS FOR DENYING THE PETITION

ARGUMENT

I

Mario Litonjua is a citizen of the United States now, having been naturalized on May 16, 1983 pursuant to the

mandate of the Court of Appeals for the Ninth Circuit [Petition for Writ of Certiorari at 9, n. 9; hereafter, Petition]. In addition, this case is completely different from those of the 14 other respondents with whom he is associated in the Government's petition. Those respondents stipulated with the Government that their cases were identical to those of the Category II veterans granted naturalization in In Re Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975), in that they made no efforts to apply for naturalization during the period of validity of the war-time statute [Petition at 4]. Litonjua, however, actually filed an application for naturalization in August 1946, but his argument in the Court of Appeals that he should be deemed to have constructively

filed his petition before the statutory deadline was not reached by that court because of its resolution of the case on another ground [Petition, Appendix A at 5a, n. 3; Barretto v. United States, 694 F. 2d 603, 605, n. 3 (9th Cir., 1983)]. Thus, should this Court eventually rule in favor of the Government on the issue of collateral estoppel, Mr. Litonjua would still have a chance to have his naturalization case sustained on that alternate ground should his case be remanded to the Court of Appeals.

II

The Government seems to consider the issue of collateral estoppel to be of particular importance in this case [Petition at 9]. However, the Government's position is not harmed if its petition is denied insofar as it relates

to Mr. Litonjua. This Court has already granted the Government's petition in the case of Mendoza v. United States, 672 F. 2d 1320, cert. granted, No. 82-849 (Jan. 24, 1983), a case which squarely confronts the issue of collateral estoppel. In addition, 14 other veterans remain in the instant case with the identical issue. The denial of the Government's petition in Mr. Litonjua's case would not prejudice the Government, which could still get its desired review of the collateral estoppel issue.

CONCLUSION

Mr. Litonjua, a United States Navy veteran with 5 years of honorable wartime service and a former prisoner of war of the Japanese, has finally obtained United States citizenship some 37 years after filing his original application for

naturalization in Seattle, Washington. That prized status should not now be disturbed in view of Mr. Litonjua's contribution to and sacrifices for the United States in World War II. He should not have to undergo the heavy additional expense of defending his case in this Court and, if reversed and remanded, of again prosecuting his case in the Court of Appeals upon those additional issues left open by that Court in its original opinion.

The additional burden upon Mr. Litonjua becomes more apparent when contrasted with the almost negligible effect upon the Government which will, in any event, have its review of the law of collateral estoppel in the case of Mendoza, supra, and in the cases of the 14 other veterans in the instant petition. Mr. Litonjua's hard-won citizenship works no offense to

the Government in its pursuit of legal principles, and it would be inequitable to disturb it now in view of his war-time sacrifices for that same Government.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Mario Valderrama Litonjua

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No. 82-1877

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

MARIO VALDERRAMA LITONJUA, ET AL.,
RESPONDENTS

BRIEF OF RESPONDENTS OTHER THAN MARIO VALDERRAMA LITONJUA IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals properly ruled that the United States was collaterally estopped from relitigating a question of constitutional law by the judgment of a district court in a prior case, involving the same subject matter, in which the question was resolved adversely to the United States and in which the United States voluntarily withdrew its appeal.

PARTIES INCLUDED IN THIS RESPONSE

This response to the petition of the United States for a writ of certiorari is submitted only on behalf of respondents Antolin Punsalan Pangilinan, Panfilo Jabalde, Fidel Zosimo Usi Canilao, Antonio Patdo Tantay, Arcadio Revilla Nepomuceno, Dionisio Vallejos Lucas, Oliver Juan Posadas, Vincente Miranda Belizario, Rodolfo DeJesus Batac, Pedro Dumlao Ponciano, Cesar Jocson Ascalon, Winifredo Pableo Bello, Bonifacio Leoncio Zarcal and Benjamin Natividad Bonus.

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RESPONSE

The parties included in this response to the petition for a writ of certiorari do not oppose the request of the United States that the petition be held for appropriate disposition in light of United States v. Mendoza, No. 82-849.

However, the respondents herein do not agree that, in every event, their cases need

be controlled by the decision in United States v. Mendoza. See Petition at 9. There are instances in which a decision in favor of the United States in the Mendoza case would not control the present cases. For example, Mendoza would not affect the present cases at all if this Court should decide in the Mendoza case that the United States should not be collaterally estopped because the factual circumstances of the case (namely, Dr. Mendoza's residence in the United States during a portion of the time that the special naturalization examiner had been removed from the Philippines) should not preclude an independent determination of Dr. Mendoza's right to naturalization. See Petitioner's Brief at 39-42, United States v. Mendoza, No. 82-849. In such an event, the respondents herein

would be entitled to a separate assessment of the issue of collateral estoppel because they resided in the Philippines for the entire time in question.

In conclusion, a decision in favor of the United States in United States v. Mendoza should not deprive the respondents herein of the opportunity to brief and argue their own cases.

Respectfully submitted,

Donald L. Ungar
Attorney for Respondents
Named Herein

June 21, 1983